EUSHUN PROPERTIES SDN. BHD. & ORS.

v.

MBF FINANCE BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. YUSOFF MOHAMED SCJ
PEH SWEE CHIN SCJ
EUSOFF CHIN SCJ
[CIVIL APPEAL NO. 02-320-91]
25 MAY 1992

CIVIL PROCEDURE: *Summary Judgment - Claim arose from a loan agreement - Term loan for 3 years - Purpose of loan two-fold objective - Breach of agreement to pay interest - Demand for repayment of principal and interest - Whether demand for immediate repayment repugnant to main purpose of facility of loan - Issue of law - Variation of clause in agreement - Section 92 Evidence Act 1950 - Whether appellant could adduce evidence to vary terms of formal agreement between parties - Collateral oral agreement - Exceptions to general rule - Whether s. 92 Evidence Act absolutely bars from adducing evidence to vary terms of formal agreement between parties - Appellants ought not be shut out to raise their defences on the issue*

This was an appeal against the decision of the learned Judge granting summary judgment under O. 14 Rules of the High Court 1980 to the respondent and holding that there was no *bona fide* triable issue raised by the appellants in their defence.

Held:

[1] The averments in the affidavit of the appellants are questions of fact which cannot be determined on affidavit evidence alone. Evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

[2] The law on collateral oral agreement is clearly spelt out in s. 92(b) of the Evidence Act 1950 and is recognised as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document.

[3] An issue of law has also been raised for determination of the Court as to whether the demand for immediate repayment made by the respondent was repugnant to the main purpose of the facility of the loan and the fact that the facility granted by the respondent to the first appellant was a term loan for three years.

[Appeal allowed with costs. Leave to sign final judgment set aside. Order that case be set down for trial.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR SIVIL: *Tuntutan berbangkit dari perjanjian pinjaman - Tempoh pinjaman selama 3 tahun - Kemungkiran perjanjian pinjaman untuk membayar faedah - Pinjaman tersebut mempunyai 2 objektif - Peminjam menuntut balik keseluruhan pinjaman - Samada tuntutan untuk pembayaran balik serta-merta tidak bersesuaian dengan objektif utama kemudahan pinjaman yang telah diberi - Isu-isu melibatkan prinsip-prinsip am undang-undang pokok dan faedah - Klausa pengubahan (variation clause) dalam perjanjian -*

Seksyen 92 Akta Keterangan 1950 - Samada perayu boleh mengemukakan keterangan yang akan mengubahkan terma-terma perjanjian formal antara kedua pihak terlibat - Perjanjian kolateral secara lisan - Kekecualian kepada prinsip-prinsip am - Samada s. 92 Akta Keterangan langsung tidak membenarkan keterangan dikemukakan untuk tujuan membuktikan pengubahan terma-terma perjanjian formal antara pihak-pihak - Perayu-perayu tidak sepatutnya "shut out" dari membangkitkan pembelaan-pembelaan mereka atas isu.

Ini adalah suatu rayuan terhadap keputusan Hakim Yang Arif yang telah membenarkan permohonan pihak responden untuk penghakiman terus di bawah Aturan 14 Kaedah-kaedah Mahkamah Tinggi 1980 atas alasan keputusan bahawasanya tiada sebarang isu yang patut dibicarakan ("triable issue") yang telah dikemukakan oleh perayu-perayu dalam pembelaan mereka.

Diputuskan:

[1] Penegasan-penegasan yang terkandung dalam afidavit perayu adalah soalan-soalan berfakta yang tidak boleh ditentukan semata-mata atas keterangan afidavit sahaja. Keterangan mengenai suasana ketika itu dan fakta latarbelakang boleh diterima dan perjanjian kolateral boleh wujud bersama-sama dengan perjanjian utama yang ia bertentangan dengan.

[2] Prinsip undang-undang mengenai perjanjian kolateral lisan telah jelas ternyata di s. 92(b) Akta Keterangan 1950 sebagai pengecualian kepada prinsip-prinsip am yang melarang keterangan extrinsik dikemukakan bagi maksud menyangkal, mengubah, menambah atau mengurangkan terma-terma satu-satunya perjanjian yang telah dituliskan dalam bentuk dokumen.

[3] Satu isu undang-undang telah pun dibangkitkan untuk penentuan Mahkamah iaitu samada tuntutan responden untuk pembayaran balik serta-merta adalah tidak bersesuaian dengan objektif kemudahan pinjaman tersebut dan bahawasanya kemudahan itu telah diberikan oleh responden kepada perayu pertama untuk tempoh selama 3 tahun.

[Rayuan dibenarkan dengan kos. Kebenaran untuk mencatitkan penghakiman muktamad diketepikan. Diperintahkan bahawa kes ditetapkan untuk perbicaraan]

[**Editor's Note:** The decision of the High Court was reported in [1992] 3 CLJ (Rep) 51
City and Coestmunter Proreiho [1934] Ltd. v. Mudd [1959] Ch 129
Helibut Symonds & Co v. Buckleton [1913] AC 30]

Cases referred to:

Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte. Ltd. [1983] CLJ (Rep) 186 ***(cons)***
Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros. [1980] 2 MLJ 16 ***(cons)***
Tan Chong & Sons Motor Co. (Sdn.) Bhd. v. Alan McKnight [1983] CLJ (Rep) 394 ***(cons)***
Esso Petroleum Co. Ltd. v. Mardon [1976] 1 QB 801 ***(cons)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92, 92 proviso (b)
Rules of the High Court 1980, O. 14

For the appellant - G. Sri Ram (Teh Meng Teck & Fiona Bodipalar with him); M/s. Meriam Cheah Teh & Su
For the respondent - Loh Siew Cheang, (Ranjit Singh with him); M/s. Cheang & Ariff

JUDGMENT

Mohd. Yusoff Mohamed SCJ:

This appeal is against the decision of the learned Judge granting an O. 14 judgment to the plaintiff/respondent and holding that there is no *bona fide* triable issue raised by the defendants/ appellants in their defence.

The claim arose from a loan agreement dated 4 September 1985 whereby the plaintiff agreed to lend RM6 million to the 1st defendant for the purpose of restructuring the borrowers' group borrowings and out of this sum, RM1.5 million was to be used for the purpose of working capital - Clause 5.01 (ii) of the agreement. The remaining defendants were the guarantors.

The amended statement of claim averred that in breach of the agreement the defendants failed to pay the interest due pursuant to Clause 7.01 of the agreement and whereupon on 13 May 1987 the plaintiff demanded repayment of the principal loan and interest thereon.

The relevant part of the letter of demand states:

> In view of your default in the payment of interest and the bad conduct of your accounts with our clients, we are now instructed to terminate the loan agreement and demand the payment of loan disbursed and the interest due thereon amounting to RM5,766,963.10 due as at 11 May 1987 of which particulars are given below:
>
> **Particulars**
>
> | | |
> |---|---|
> | Principal | RM5,211,000.00 |
> | Interest | RM 533,259.62 |
> | Penalty Interest | RM 22,703.48 |
> | | RM5,766,963.10 |

As in the Court below, the defendants argued before us that the loan granted by the plaintiff had two-fold objective - the initial drawdown of RM4.5 million for the purpose of restructuring the 1st defendant's group borrowings whilst the remaining RM1.5 million was to service the payment of interests when due. They maintained that there existed a collateral agreement between the parties with regard to the drawdown of the RM1.5 million as represented to them by the then chief general manager of the plaintiff named Kung Beng Hung that the sum would be used to service the interest accruing on a quarterly basis.

In support of this contention the defendants referred to Clause 5.01 (ii) of the agreement and their correspondence with the plaintiff dated 26 November 1985 and 29 November 1985.

On behalf of the plaintiff/respondent it was argued that Clause 5.01 of the agreement stipulated that RM1.5 million loan was to be used for working capital and that prior written consent of the plaintiff was required for any other purpose. In the circumstances, the plaintiff contended that the defendants could not lead evidence to vary or contradict Clause 5.01. In the alternative, the plaintiff contended that even if the defendants' contention that the RM1.5 million loan was to service interest of the first drawdown of RM4.5 million were admissible, the plaintiff was entitled to stop further disbursement of the RM1.5 million because overdues on certain existing accounts of the first defendants' group of companies had not been fully settled.

On these arguments the learned Judge ruled that:

> Against this Kung Beng Hong (who is no more with the plaintiffs) has sworn an affidavit denying that he had been party to any such agreement.
>
> Now, as has been seen, Clause 5.01 (ii) of the loan agreement sets out that the RM1.5 million was for the purpose of working capital and the clause goes on to provide that if the money was to be utilised for any other purpose the prior written consent of the lender is required.
>
> In my judgment while it could very well be that there is nothing wrong with utilising working capital to pay interest that may be due, unless there is admissible evidence of a clear agreement to the effect that the drawdowns were to be utilised to pay off interest the defendants' contention in this respect is unacceptable.
>
> The two letters that the defendants rely on do not state that the money is to be used to pay off interest. In any event the plaintiffs have rightly called to aid s. 92 of the Evidence Act to contend that the defendants are precluded from adducing evidence to contradict or vary the terms of the formal agreement between the parties.

We agree with the learned Judge that there is nothing wrong to utilise working capital for payment of interest due on the loan provided that consent of the lender was obtained under Clause 5.01 (ii) of the agreement. The clause provides:

> The proceeds of the loan shall be applied by the borrower or for the borrower's benefit as follows:
>
> (i) a sum of Ringgit Four Million Five Hundred Thousand (RM4,500,000) for the purpose of restructuring the borrower's group borrowings.
>
> (ii) a sum of Ringgit One Million Five Hundred Thousand (RM1,500,000) for the purpose of working capital.
>
> In the event that the borrower shall require to use the proceeds of the loan for any other purpose the borrower shall obtain the prior written consent of the lender.

We also agree with the learned Judge that the two letters do not say clearly that the money disbursed were to be used to pay interest on the loan. But considering the amount and the dates of the drawdown on a quarterly basis shown in the two letters coincided with interest as due and payable under the loan militates against the granting of an O. 14 judgment, it is our view this should be left to the trial Judge to determine whether in the circumstances of the evidence as a whole these contemporaneous letters would amount to prior written consent of the lender within the meaning of Clause 5.01 (ii) of the agreement.

It is also our view that s. 92 of the Evidence Act does not absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between parties. As asserted in the affidavits of the defendants there had been negotiations between Kung Beng Hung, the previous general manager of the plaintiff on the purpose of the loan and the intent of the initial drawdown of the RM1.5 million on a quarterly basis. It is also averred by the defendant that when their true arrangement was not reflected in the agreement the defendants had raised certain queries and assurances were given by Kung to them.

These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

The law on collateral oral agreement is clearly spelt out in s. 92(b) of the Evidence Act. It is recognised as one of the exceptions to the general rule for bidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document. In *Keng Huat Film Co. Sdn Bhd. v. Makhanlall (Properties) Pte. Ltd.* [1983] CLJ (Rep) 186 Mohamed Azmi FJ said:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, **evidence of surrounding circumstances and factual background have always been admissible.**
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> (Emphasis added)

In another case, *Tan Swee Hoe Co. Ltd v. Ali Hussain Bros.* [1980] 2 MLJ 16, which is generally considered as the leading authority on the matter, the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of RM14,000 as tea money. The written tenancy agreements were later executed by the parties but neither referred to the appellants' promise. A dispute arose between the parties and the appellants eventually sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished and so long as they paid the rent regularly. The trial Judge dismissed the appellants' claim and ordered them to register a lease in favour of the respondents for a term of 28 years. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss. 91 and 92 of the Evidence Act. Dismissing the appeal, Raja Azlan Shah CJ (as he then was) held:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty.
>
> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contracts was made by Lord Moulton in *Heilbut Symons & Co. v. Buckleton* [1913] AC 30, 47 ... The case of *City and Westminster Properties (1934) Ltd. v. Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* [1965] 1 All ER 65, 67:
>
> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it to say that the representation was intended to be acted on and was in fact acted on.

In another case, *Tan Chong & Sons Motor Co. Sdn. Bhd. v. Alan McKnight* [1983] CLJ (Rep) 394, the respondent, an Australian national, wanted to purchase a car and get the benefit of exemption from duty in Malaysia and Australia. He would have obtained the exemption if the car was taken out of Malaysia and if it complied with the Australian design regulations. He agreed to purchase the car from the appellants and signed a buyer's order which contained a condition that no guarantee or warranty of any kind whatsoever was given by the company. The respondent maintained that he only agreed to purchase the car on the

representations of the appellants' salesman that the car conformed to the Australian design regulations. The car which was subsequently delivered to the respondent did not comply with the regulations and the respondent suffered loss, including the loss of the fiscal advantage of importing it duty free into Australia. In an action by the respondent for breach of warranty, the trial Judge held that there had been a breach of warranty and general damages were awarded to the respondent. On appeal, Salleh Abas FJ (as he then was) in dismissing the appeal said:

> ... (The) first question to ask in this case is this: Was there a warranty and if so, was it breached?
>
> The word 'warranty' in the law of contract tends to be confusing as it may relate to a term of a contract, or to a separate enforceable promise which is collateral to a contract ...
>
> It is in the context of a collateral warranty that the respondent found his cause of action in this case ... For the purpose of determining whether these words and conduct amount to a warranty enforceable at the suit of the respondent, we can do no better than be guided by the test laid down by Lord Denning MR in *Dick Bentley Productions Ltd. & Anor. v. Harold Smith (Motors) Ltd*., a test which he had followed and applied in subsequent cases ...

On the evidence, the Court held that representations were in fact made by a salesman (a Mr. Sze) employed by the appellants and who certainly had an ostensible authority to make such representations. The Court further held that it would lead to "a great mischief" in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with. With regard to the issue of admissibility of such pre-contract statements, Salleh Abbas FJ further held (at p. 399) that:

> There is this rule of evidence contained in s. 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section ... We therefore hold that the oral representations made by Mr. Sze were admissible.

In *Esso Petroleum Co. Ltd. v. Mardon* [1976] 1 QB 801 the plaintiffs, an established oil company, found a site on a busy main street which they considered suitable for a filling station. One of their most experienced employees estimated that the potential throughput was likely to reach 200,000 gallons by the third year of operation. The defendant had a more realistic estimate, that of 100,000 to 150,000 gallons as being more likely; but his doubts were dispelled by his trust in the greater experience and expertise of the plaintiffs' employees and soon thereafter the parties entered into a written tenancy agreement for three years.

Despite his best endeavours, the defendant could not attain the promised sales volume and he lost money. In September 1984, intending to keep the station open and to lighten the defendant's financial burden, the plaintiffs offered the defendant a new tenancy agreement at a lower rental. Unfortunately the losses continued and when the defendant finally became unable to pay cash for the petrol the supplies were terminated. In December 1966, the plaintiffs claimed possession of the premises and moneys owed by the defendant. The defendant gave up possession in March 1967 but he counterclaimed for damages for breach of warranty and alternatively for negligent misrepresentation.

The trial Judge held that the appellants' statement with regard to the estimated sales volume (the potential throughput) was not a warranty as to give to the defendant a cause of action for breach of warranty. The Judge, however, held that the plaintiffs were liable for negligent

representation. On appeal by both parties, the Court of Appeal held that the statement made by the plaintiffs as to "potential throughput" was a contractual warranty. Lord Denning MR held (at p. 817) that:

> Ever since *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege ... that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty ... (There) have been many cases ... where we have readily held a representation - which induces a person to enter into a contract - to be a sounding in damages. I summarised them in *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* ... In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken ... For this they are liable in damages ...

Another issue dealt by the learned Judge was the reason for the plaintiff to suspend disbursements of the defendants' account on the ground that there existed an amount overdue on another loan between the parties. He ruled that this was a breach of Clause 6.01(g) of the agreement which provides for full settlement of "overdues on existing accounts." From the records of proceedings it is apparent that the issue was only taken in the course of argument and that there is no such averment in the plaintiff's statement of claim nor notice given to the defendants of the breach. We feel that the defendants ought not be shut out to raise their defences on the issue.

It has also been alluded to us that this is a term loan for a specified period of 3 years and it would be premature for the plaintiff to recall the loan mid-term until the full loan has been disbursed.

Clause 8.01 of the agreement expressly stipulates that the "tenure of the loan shall be for the maximum period of thirty-six (36) months from the date of the first disbursement of the loan ..." To ensure that the first defendant (the borrower) shall fully utilise the loan, Clause 6.05 of the agreement states that "The borrower shall pay a commitment fee of one percent (1%) per annum on the undrawn amount of the loan to the lender and such commitment fee shall be paid quarterly in arrears until the loan is fully disbursed." The importance of this point becomes apparent when one considers the following decision in *Titford.*

In an unreported decision of Goff J in *Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd. on 22 May 1975* (published in Creswell, *Encyclopaedia of Banking Law* at pp. 71-72), the defendant bank had granted term loan facilities to the plaintiffs. The letter granting the facility to the plaintiffs, stated that:

> We have pleasure in advising you of the terms and conditions upon which we are prepared to provide an overdraft facility in the maximum sum of Sterling pounds 248,000 for a period of 12 months to assist you in the purchase and development of the undermentioned freehold premises.

However, in each facility letter issued by the defendant bank to the plaintiffs, certain specific conditions of the loan were spelt out, amongst which was Clause 9, which stipulated that:

> All moneys due by you, whether by way of capital or interest, shall be payable on demand and you shall have the right to repay all moneys due without notice.

In the face of this apparent contradiction in terms of the loan facility, Goff J said:

> It seems to me, where a bank allows an overdraft for a fixed time for a specific purpose - whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer

might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure.

Holding that Clause 9 was repugnant to the whole facility granted by the defendant bank, Goff J continued:

(The Bank) could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify Clause 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.

Goff J's decision in *Titford Property* was considered by Gibson J in *Williams and Glyn's Bank Ltd. v. Barnes* [1980] (unreported, published in Creswell, *Encyclopaedia of Banking Law* at pp. 72-73) in the following terms:

It is clear to me that Goff J decided that the true purpose of the agreement contained in the facility letter was to provide money to be laid out in a development project with a view to profit. A provision for repayment on demand was, he concluded, repugnant to that main purpose ...

Gibson J did not specifically disagree with Goff J's decision in deciding the matter before him on the principle of repugnancy but said that he would prefer to decide the main object and intention of the transaction on point of construction of contract.

In view of the fact that the facility granted by the respondent to the first appellant in this present appeal is a term loan for three years, we are of the opinion that an issue of law has also been raised for determination of the Court as to whether the demand for immediate repayment made by the respondent on 22 May 1986 was repugnant to the main purpose of the facility of the loan.

In conclusion, we allow the appeal with costs, set aside leave to sign final judgment and order that the case be set down for trial.

Also found [1992] 3 CLJ 1519